No. 86-2028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ILLINOIS STATE BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Illinois General Assembly effectively nullified the duties imposed upon the Illinois State Board of Education ("State Board") under the federal Equal Educational Opportunities Act of 1974 ("Act"), 20 U.S.C. §1701 *et seq.*, by incapacitating the State Board from filing a counterclaim against a local school district to restrain it from intentionally discriminating on the basis of race under the Act?

II. Whether the only state agency charged under state law with the duty of supervising local school districts may properly sue as *parens patriae* to enjoin a local school district from intentionally discriminating on the basis of race?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions and Statutes

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OPINIONS BELOW

The divided opinion of the Seventh Circuit (App. A, *infra*, 1a-14a) is reported at 810 F.2d 707. The opinion of the district court (App. C, *infra*, 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1987, and a petition for rehearing was denied on March 18, 1987. (App. B, *infra*, 15a-16a). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1701 *et seq.*, which provides in §1703:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title [20 U.S.C. §§1712 *et seq.*], to remove the vestiges of a dual school system;
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the schools closest to his or

her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Finally, this case involves §22-19 of the Illinois School Code, Ill. Rev. Stat. 1986, ch. 122, §22-19, which provides as follows:

Upon the filing of a complaint with the State Board of Education, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10% of the residents, whichever is less, alleging that any pupil has been excluded from or segregated in any school on account of his or her color, race, nationality, sex, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his or her color, race, nationality, sex, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the State Board of Education shall promptly mail a copy of such complaint to the secretary or clerk of such school board.

The State Board of Education shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. The State Board of Education may also fix a date for a hearing whenever it has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first signatory to such complaint.

The State Board of Education may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The State Board of Education or the hearing officer appointed by it shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any circuit court of this State, upon the application of the State Board of Education or the hearing officer appointed by it, may, in its or his or her discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the State Board of Education or the hearing officer appointed by it conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before the court. The State Board of Education or the hearing officer appointed by it may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but

the formal rules pertaining to evidence in judicial proceedings shall not apply. The State Board of Education shall provide a competent reporter to record all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. A continuance may be granted provided both parties agree. The hearing officer shall report a summary of the testimony within 60 days after the hearing commences, unless a continuance is granted, to the State Board of Education who shall determine whether the allegations of the complaint are substantially correct. If a continuance is granted, the summary of testimony shall be reported to the State Board of Education within 60 days after the hearing recommences. The State Board of Education shall notify both parties of its decision within 30 days after it receives a summary of the testimony from the hearing officer. If the State Board of Education determines that a violation exists, it shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

* * *

STATEMENT

The petitioner, Illinois State Board of Education (the "State Board"), is a division within the executive branch of government of the State of Illinois created by Article X, Section 2 of the 1970 Constitution and is charged under state law, among other things, to "supervise all the public schools in the State." Ill. Rev. Stat. 1986, ch. 122, §2-3.3. The respondent, Board of Education of the City of Peoria, School District No. 150 ("Peoria School District"), is a "school district" within the meaning of the 1970 Constitu-

tion and the meaning of the Illinois School Code, Ill. Rev. Stat. 1986, ch. 122, §1-1 *et seq.*

This case arises out of petitioner's unsuccessful attempt to bring a compulsory counterclaim against the Peoria School District to enjoin it from intentionally operating a segregated school program in violation of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1701 *et seq.* ("EEOA" or the "Act"), as well as 42 U.S.C. §1981, the State Constitution, and the Fourteenth Amendment to the United States Constitution. The United States Court of Appeals for the Seventh Circuit held, in a divided decision, that although petitioner could be sued, it lacked the capacity to sue under Illinois state law and Rule 17(b) of the Federal Rules of Civil Procedure. (App., *infra*, 6a-9a). The Seventh Circuit also held that the Act did not impose an affirmative duty upon the petitioner to bring suit to enjoin the Peoria School District from intentionally discriminating in violation of the Act. (App., *infra*, 9a-11a).

A. The Statutes

In 1974, in order to ensure that all children enrolled in public schools would be entitled to equal educational opportunity without regard to race, color, sex, or national origin, Congress enacted the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-1758 (1982), which prohibits the States from denying equal educational opportunity to individuals by engaging in certain discriminatory practices, or by failing to take certain remedial action, through its "educational agencies".

The EEOA defines "educational agency" to mean a "State" educational agency or a "local" educational agency. 20 U.S.C. §1720(a) (1982). It defines "State educational agency" as "the State board of education or other agen-

cy or officer primarily responsible for the State supervision of public elementary and secondary schools * * *." 20 U.S.C. §3381(k) (1982). It defines "local" educational agency to include any "public institution or agency having administrative control and direction of a public elementary or secondary school." 20 U.S.C. §3381(f) (1982).

Section 22-19 of the Illinois School Code, Ill. Rev. Stat. 1986, ch. 122, §22-19, enacted in 1961, establishes a procedure for the State Board to address certain discriminatory practices in any of the school districts. Specifically, §22-19 provides that the State Board, upon receipt of a complaint alleging certain discrimination signed by at least fifty (50) petitioners within a school district or ten percent (10%) of the residents of a school district, whichever is less, shall, or whenever it has reason to believe that such discrimination may exist in any school district, may, hold a hearing. If after such a hearing the State Board determines that a violation exists, it "shall request" the Illinois Attorney General to "apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of."

B. The Litigation

On March 26, 1984, the Peoria School District filed suit in the federal district court against the United States Department of Education ("USDE") and the State Board. The Peoria School District sought to enjoin the USDE from conducting a hearing pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, to investigate charges that the Peoria School District had engaged in intentional race discrimination against black citizens in its assignment of students to various programs in its public schools and in its assignment of educational personnel to various buildings and programs. The Peoria

School District sought declaratory judgments that the USDE was precluded from relitigating the facts and issues allegedly decided in another federal action, that the USDE lacked jurisdiction to consider employment practices, and that any such hearing was premature. The Peoria School District also sought to enjoin the USDE from holding the hearing or from withholding or terminating federal assistance payments under Title VI of the Civil Rights Act of 1964. No allegations were made or relief sought against the State Board.

The State Board counterclaimed against the Peoria School District alleging that the Peoria School District was guilty of operating its program for gifted students as an intentionally segregated program by race and sought declaratory and injunctive relief.[1]

The Peoria School District subsequently settled with the USDE and voluntarily dismissed its complaint against the State Board.

The Peoria School District then moved to dismiss the State Board's counterclaim based upon alternative grounds: first, that the State Board lacked standing; and alternatively, that the district court stay any action on the counterclaim pending determination of certain issues in a related state court action between the two parties.[2]

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[1] The Peoria School District's program for gifted students is available to up to 300 specially selected students enrolled in the fourth through eighth grades and is intended to give special training and enhanced educational opportunity to academically gifted children.

[2] In a state court action between the parties, *Board of Education of the City of Peoria v. Sanders*, 150 Ill. App. 3d 755, 502 N.E.2d 730, 104 Ill. Dec. 233 (3d Dist. 1986), the Illinois Appellate Court held that under §22-19, the State Board lacked authority to withhold funds from local school districts which it found to be

(Footnote continued on following page)

On August 30, 1985, the district court dismissed the State Board's counterclaim holding that the State Board lacked standing to sue the Peoria School District. Relying on *Aurora East Public School District No. 131 v. Cronin*, 92 Ill. 2d 313, 66 Ill. Dec. 85, 442 N.E.2d 511 (1982), the lower court construed §22-19 of the School Code to preclude the State Board from initiating litigation to combat racial segregation; that no federal constitutional or statutory provision imposed an affirmative duty upon the State Board to bring such a suit, but that it was left to the states to determine how to fulfill their responsibilities under the United States Constitution and applicable federal law; and finally, that the State Board lacked standing to assert the constitutional rights of the students of the subject school district. (App., *infra*, 17a-20a).

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit on the issue of its standing to sue under applicable state and federal law. The Seventh Circuit affirmed the district court's decision in a divided decision.

The court of appeals, *sua sponte*, first analyzed the issue as one of capacity to sue, rather than one of standing to sue, and read Rule 17(b) of the Federal Rules of Civil Procedure to require that state law govern the capacity of a political subdivision of a state to sue. (App., *infra*, 4a-5a). The court then held that, under its construction of Illinois law, the State Board lacked capacity to main-

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[2] *continued*
engaging in intentional racial discrimination. The State Board petitioned the Illinois Supreme Court for leave to appeal, but the petition was denied with one dissent. (Ill. Sup. Ct. No. 64916, June 4, 1987).

tain an action to eliminate racial segregation in the public schools. (*Id.* at 6a-9a). The court found that the state constitution and legislative scheme, when viewed in their entirety, made the local school boards "primarily" responsible for taking appropriate action to achieve and maintain racial equality in education, and that the State Board's role was limited by §22-19 to investigating charges of discrimination and, upon finding a violation, requesting the Illinois Attorney General to file suit for relief. (*Id.* at 8a-9a). The court found confirmation for its interpretation of the division of responsibility within the state government in *Aurora East Public School District No. 131 v. Cronin*, 92 Ill. 2d 313, 66 Ill. Dec. 85, 442 N.E.2d 511 (1982). (*Id.* at 7a-8a).

The court of appeals then turned to the issue of whether the federal EEOA imposed an affirmative duty upon the State Board to file suit against a local school district engaged in *de jure* racial discrimination. In rejecting the petitioner's argument that it was so obligated under the EEOA, the court of appeals reasoned that:

> The [EEOA] does not require that the power to enforce its mandate be vested in any particular state agency; it simply requires that the *state* ensure compliance. Illinois has chosen to vest primary responsibility in its local school boards, supervisory and investigatory responsibility in its State Board and enforcement responsibility in its Attorney General. If the State Board desires a redistribution of those responsibilities, it must address the state legislature, not the federal court. (App., *infra*, 10a) (emphasis in original).

The court of appeals also rejected the petitioner's reliance on *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984); *Idaho Migrant Council v.*

Board of Education, 647 F.2d 69 (9th Cir. 1981); and *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), as authority for its duty to sue to enforce the EEOA, holding that these decisions:

> * * * merely stand for the proposition that a state board of education is a proper party *defendant* when the plaintiff alleges that its failure to fulfill its responsibilities under state law has produced state non-compliance with the EEOA. (App., *infra*, 10a) (emphasis in original).

The court of appeals went on to reject any applicability of *McNeese v. Board of Education*, 373 U.S. 668 (1963), which also involved §22-19, reasoning that in *McNeese* this Court merely held that private litigants need not avail themselves of the state's "administrative procedures" set forth in §22-19 before bringing suit under 42 U.S.C. §1983 to protest racial segregation in a public school system. (App., *infra*, 10a n.8).

The court also rejected the State Board's right to maintain a *parens patriae* action because of the "limited role" it construed the State Board to have "in Illinois' overall fulfillment of responsibilities with respect to racial equality in education." (App., *infra*, 8a n.6).

Finally, the court held that the State Board lacked third party standing to vindicate the rights of the children because the children's parents and the Attorney General could vindicate those rights. (App., *infra*, 9a n.7).

The dissent found that the majority's decision significantly implicated the Supremacy Clause of the United States Constitution and furnished "a dangerous precedent for frustrating federal anti-discrimination statutes and the fourteenth amendment through allocations of responsibility for civil rights enforcement among state agencies and local

governmental bodies under state law." (App., *infra*, 11a). It reasoned that the State Board was required to maintain its suit against the Peoria School District because:

> State educational officials, who are the members of the state's executive branch charged with the oversight of education in the state, have a duty under federal law to enforce the Constitution and the federal statutes which implement it. (*Id.* at 12a).

In particular, the dissent found that the EEOA imposes "specific responsibilities" upon the State Board as a "State educational agency" within the meaning of the Act, including the responsibility to enforce the EEOA; and that such duties could not be delegated by the State of Illinois to local school districts so as to relieve the State-level educational officials of further responsibility:

> It is surely not an adequate answer to say that the state has delegated these duties to its local school districts and therefore that the state as such, through educational officials at the state level, has no further responsibility. To accept this proposition is to suggest that federal civil rights enforcement may be effectively nullified by entrusting it under state law to the very entities against which enforcement might be required. (*Id.* at 13a).

The dissent also rejected the majority's contention that the procedure set forth in §22-19 of the Illinois School Code was sufficient to ensure that the duties imposed on the State Board by the EEOA would be fulfilled. (*Id.* at 14a). It found the statutory procedure "too cumbersome to provide effective oversight of local boards", citing *McNeese v. Board of Education* (1963), 373 U.S. 668, which itself "pointed out emphatically the manifest inadequacies of" §22-19. (*Id.*). "While the State Attorney General may have the power to seek enforcement after the State Board holds a hearing, his office is not the agency

to which state resources to underwrite substantive responsibility for education are committed." (*Id.* at 13a-14a). Nor, the dissent went on, could any local school district be expected to enforce the Act against itself:

> [E]ven if Illinois wanted to leave all civil rights enforcement to its local school districts, it had no power under federal law to do this when the school districts themselves were the likely civil rights violators. (*Id.* at 14a).

The dissent concluded:

> In general, a state may "distribute responsibility" within state government. But it may not do so when, as here, a federal duty has been placed on the state and the result of the state legislature's distribution of responsibility in fulfilling this duty is to leave only foxes at the chicken coop door. (*Id.*).

REASONS FOR GRANTING THE PETITION

I.

THE SEVENTH CIRCUIT'S DECISION PROVIDES STATES WITH "A DANGEROUS PRECEDENT" TO FRUSTRATE ENFORCEMENT OF THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974.

In the words of the dissent, the majority decision[3] holding that the Illinois General Assembly may incapacitate the State Board from suing to enforce the EEOA "signifi-

[3] The State Board asserts, as did the dissent, that the Seventh Circuit in fact misconstrued §22-19 to bar the State Board from filing suit. (App., *infra*, 11a-12a). That aside, however, the question presented here is whether federal law imposes a duty to enforce the EEOA which is *independent* of the State Board's powers and duties under Illinois law.

cantly implicates the Supremacy Clause and furnishes a dangerous precedent for frustrating federal anti-discrimination statutes and the fourteenth amendment through allocations of responsibility for civil rights enforcement among state agencies and local government bodies under state law." (App., *infra*, 11a). Simply stated, the decision raises the spectre that state legislatures may, as here, leave enforcement of federal rights to an already overburdened Attorney General and to the very local school districts which are the likely violators. "To accept this proposition," the dissent correctly diagnosed, "is to suggest that federal civil rights enforcement may be effectively nullified by entrusting it under state law to the very entities against which enforcement might be required." (*Id.* at 13a).

A. The Act Imposes Specific Duties Upon The State Board To Enforce The Act's Anti-Discrimination Mandate.

The central point which escaped the majority, but not the dissent, is that the Act imposes specific duties upon the State Board, as Illinois' "State educational agency", to enforce the Act's anti-discrimination mandate.

There is no dispute that the State Board meets the Act's definition of "State educational agency" under 20 U.S.C. §3381(k) as "the State Board of education or other agency or officer primarily responsible for the state supervision of public elementary and secondary schools * * *." The State Board is in fact charged under state law to "supervise all the public schools in the State." Ill. Rev. Stat. 1986, ch. 122, §2-3.3. Indeed, as the dissent recognized, the State Board is "the only state-level watchdog for civil rights in education * * *." (App., *infra*, 12a).

Consistent with the broad remedial purposes of the EEOA, every appellate court which has addressed the issue, in-

cluding the Seventh Circuit, has held that state-level educational agencies such as the State Board are required to ensure compliance with the EEOA. In *Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981), the Idaho Migrant Council brought suit against certain state educational agencies alleging that they had failed to exercise their supervisory powers over local school districts to ensure that students received equal educational opportunity under §1703(f) of the Act. The Ninth Circuit upheld the plaintiff's action holding that the EEOA "imposes requirements on the *State Agency* to ensure that plaintiffs' language deficiencies are addressed" by local districts *independent* of what state law empowered the state agency to do. *Id.* at 71 (emphasis added).

Similarly, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1987), the Seventh Circuit itself held that §1703(f) of the EEOA "places the obligation on *both* state and local educational agencies to provide equal educational opportunities to their students." *Id.* at 1041 (emphasis in original). In fact, the Seventh Circuit there recognized that "[s]tate agencies cannot, in the guise of deferring to local conditions, completely delegate in practice their obligations under the EEOA; otherwise, the term 'educational agency' no longer includes those at the state level." *Id.* at 1043.

In the same vein, in *United States v. School District of Ferndale*, 577 F.2d 1339, 1348 (6th Cir. 1978), the Sixth Circuit upheld "the principle of joint liability" for state and local educational agencies, and in particular held that a cause of action under the EEOA against the state agency was validly stated for "knowingly support[ing]" prohibited practices. See also *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983).

Although it is true that none of the decisions cited above addressed the specific question of whether the duty imposed upon a state agency to ensure compliance with the Act could stop short of the power to bring suit to enforce it, it is clear that any such duty would be rendered illusory if the agency had no power to file suit to ensure compliance.[4] The duty to enforce necessarily includes the duty to bring suit.

B. The Illinois General Assembly's Incapacitation Of The State Board To Sue To Enforce The EEOA Raises The Spectre That Enforcement Of The EEOA Against Local School Districts May Be Nullified.

Notwithstanding the State Board's duties under the EEOA, the Seventh Circuit read §22-19 to incapacitate the State Board from filing suit to enforce the EEOA, holding that it limited the State Board to merely *requesting* the Illinois Attorney General to file suit to enjoin any discrimination that the State Board finds in publicly-provided education.

Under that interpretation, the State Board—"the only state-level watchdog for civil rights in education"—is therefore effectively denied the power to carry out its duties under the Act and enforce the Act against local school districts. It can only request that the state Attorney General file suit. If an overburdened Attorney General did not proceed, the expert determination by the only state-level agency charged with supervision of the public schools (and investigating charges of discrimination in education)

[4] This principle is particularly acute here given the state court's ruling that the State Board lacks even the power to cut off funds to a local school district engaged in intentional racial discrimination. *Board of Education of the City of Peoria v. Sanders*, 150 Ill. App. 3d 755, 502 N.E.2d 730, 104 Ill. Dec. 233 (3d Dist. 1986), *pet. den.*, No. 64916 (Ill. Sup. Ct. June 4, 1987).

that the EEOA was being violated would be effectively nullified. As the dissent emphasized, in such a situation one could hardly expect a local school district in violation of the Act to sue itself. (App., *infra*, 13a, 14a).

In sum, the Seventh Circuit's decision raises the spectre that enforcement of the EEOA can be minimized or nullified by a state statutory scheme which incapacitates an agency with duties under the EEOA and distributes responsibility so as "to leave only foxes at the chicken coop door." (*Id.* at 14a).

II.

THE SEVENTH CIRCUIT'S DECISION VIOLATES A LONG LINE OF DECISIONS BY THIS COURT HOLDING THAT UNDER THE SUPREMACY CLAUSE A STATE STATUTE IS VOID TO THE EXTENT IT OBSTRUCTS ACCOMPLISHING THE FULL PURPOSES AND OBJECTIVES OF FEDERAL LAW.

It is well-established that under the Supremacy Clause a "state statute is void to the extent it conflicts with a federal statute * * *." *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). Simply stated, federal law pre-empts state law "to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible * * *, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461, 469 (1984) (quoting *Hines v. Davidowitz* (1941), 312 U.S. 52, 67) (citations omitted).[5] Accordingly, "federal courts must be ever vigilant

[5] *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99 (1984); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982).

to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest * * *.' " *Burks v. Lasker*, 441 U.S. 471, 479 (1979) (quoting *Wallis v. Pan American Petroleum Corp.* (1966), 384 U.S. 63, 68).

Furthermore, in determining whether state law conflicts with federal law, the court must look to the effect rather than the purpose of the state law. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); *New York State Commission on Cable Television v. F.C.C.*, 669 F.2d 58, 62 (2d Cir. 1982).

The Seventh Circuit's reading of §22-19 of the Illinois School Code as incapacitating the State Board from filing suit to enforce the EEOA means that §22-19 violates the Supremacy Clause because it obstructs "the accomplishment and execution of the full purposes and objectives" sought to be achieved by the EEOA. The purpose which impelled Congress to enact the EEOA, clearly set out in §202 (20 U.S.C. §1701), was to eliminate discrimination in educational opportunity:

> (a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) the neighborhood is the appropriate basis for determining public school assignments.
>
> (b) In order to carry out this policy, it is the purpose of this part (20 U.S.C. §1701 *et seq.*) to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

By holding that the State Board lacks capacity *under Illinois law* to sue to ensure compliance with the EEOA by local school districts, the court of appeals opened a back door through which the several States, through their

legislatures, may avoid their duties under the EEOA. As pointed out in Section I above, the court of appeals' reasoning invites state legislatures to distribute responsibility for enforcing the EEOA in a manner which diminishes—or even nullifies—the chance that the EEOA's objectives will be enforced and accomplished.[6]

In conclusion, the Seventh Circuit's construction of §22-19 of the Illinois School Code to in fact bar the State Board from performing its duties under the EEOA "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and is to that extent void under the Supremacy Clause of the United States Constitution. *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

III.

THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *McNEESE v. BOARD OF EDUCATION* WHICH FOUND §22-19 INADEQUATE TO PROTECT FEDERAL CIVIL RIGHTS.

In *McNeese v. Board of Education*, 373 U.S. 668 (1963), a case which also involved §22-19 of the Illinois School Code,[7] this Court held that a litigant was not required

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[6] The Seventh Circuit's reliance on *Aurora East Public School District No. 131 v. Cronin*, 92 Ill. 2d 313, 442 N.E.2d 511, 66 Ill. Dec. 85 (1982), to support the conclusion that the State Board lacked capacity to sue under the EEOA is misplaced since *Aurora* dealt only with the State Board's power to act under *Illinois* law. No federal statutes or obligations were there at issue. The question in this action, however, is whether the State Board has the *federally-imposed duty* to initiate legal action to remedy unlawful racial discrimination under the EEOA.

[7] Section 22-19 was subsequently amended by P.L. 81-1508 to replace references to the Superintendent of Public Instruction with references to the State Board.

to exhaust his administrative remedies under §22-19 before resorting to a federal court to vindicate federal rights. *Id.* at 674-76. In reaching this decision, this Court explained that §22-19 did not provide adequate protection for federal rights:

> [I]t is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights. Under §22-19 of the Illinois School Code petitioners could file a complaint alleging discrimination *if* they could obtain the subscription of the lesser of 50 residents or 10% of the school district. The [State Board] would then be required to hold a hearing on the matter. * * * The [State Board] apparently has no power to order corrective action. In other words, [its] "only function . . . is to investigate, recommend and report. [It] can give no remedy. . . . [It] can make no controlling finding of law or fact. . . . [Its] recommendation need not be followed by any court . . . or executive officer." * * * It would be anomalous to conclude that such a remedy forecloses suit in the federal courts when the most it could produce is a state court action that would have no such effect. * * * When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary. *Id.* at 675-676 (citation omitted).

In contrast, the Seventh Circuit in its decision below held that the State Board's ability to fulfill its federal duties under the EEOA was limited to its power to act under the same state law. By so holding, the Seventh Circuit in effect erroneously incorporated §22-19 into the EEOA and thereby limited the State Board's power to act under the EEOA to the severely restricted procedure outlined in §22-19: the very same procedure which this Court previously held inadequate to protect federal rights.

Although *McNeese* arose in a different context, its reasoning applies with equal force in this case: §22-19 may not be used as a mechanism by which to deprive the State Board of the ability to perform its federally-imposed duties, and protect the federal civil rights, set out in the EEOA.

IV.

THE SEVENTH CIRCUIT FAILED TO RECOGNIZE THAT A STATE AGENCY MAY PROPERLY SUE AS *PARENS PATRIAE* TO ENJOIN A LOCAL SCHOOL DISTRICT FROM INTENTIONALLY DISCRIMINATING ON THE BASIS OF RACE WHERE THE STATE AGENCY IS CHARGED WITH SUPERVISING THE LOCAL SCHOOL DISTRICTS.

In order to have standing to maintain an action as *parens patriae*, a state "must assert an injury to * * * a 'quasi-sovereign' interest * * *." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). There is no doubt that a state has a quasi-sovereign interest "in securing residents from the harmful effects of discrimination." *Id.* at 609. As stated by this Court in *Snapp*:

> This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.

Id. at 609.

Notwithstanding the State of Illinois' substantial interest in protecting its residents from the harmful effects of racial discrimination in its public school system, the Seventh Circuit rejected the State Board's argument that it was entitled to sue as *parens patriae* due to the "limited role" which the court construed the State Board to have in ensuring racial equality in education. (App., *infra*, 8a n.6).

The Seventh Circuit reached this conclusion in the face of the fact that the State Board is the *only* state-level agency charged with supervising the public education system in the State of Illinois.

The court of appeals also erroneously relied upon two Ninth Circuit cases, *United States v. City of Pittsburgh, California*, 661 F.2d 783 (9th Cir. 1981) and *In re Multi-District Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir. 1973) in reaching its conclusion. In *Pittsburgh*, the Ninth Circuit held only that the *City* of Pittsburgh lacked standing to sue as *parens patriae* because "only the states and the federal government may sue as *parens patriae*," and a city is not a state. *Pittsburgh*, 661 F.2d at 786-87. Similarly, in *M.D.L.*, the same circuit merely held that "political subdivisions such as cities and counties" cannot sue as *parens patriae*. *M.D.L.*, 481 F.2d at 131. Neither of these cases, however, stands for the proposition that a *state-level body* may not sue as *parens patriae*.

The distinction between the cases relied upon by the court of appeals and the facts of this case underlines the conclusion that the State Board is entitled to maintain this action as *parens patriae*. In particular, while a city or county, or other municipal corporation cannot, by definition, bring an action on behalf of *all* of the residents of a state, the same cannot be contended with respect to a *state-level* political body, which, by definition, acts on behalf of all of the residents of the state. Indeed, it has been recognized that "[a]n action brought by a state official in his own name *for the benefit of the state* is properly characterized as an action by the state itself." *Busbee v. Continental Ins. Co.*, 526 F. Supp. 1243, 1245 (N.D. Ga. 1981) (emphasis supplied). See also *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (upholding an action where the Secretary of Labor of the Commonwealth of Puerto Rico brought suit as *parens patriae* to

protect its residents from unlawful discrimination in employment practices).

In this case, in contrast with *Pittsburgh* and *M.D.L.*, the State Board is a *state-level* body which acts on behalf of all of the people of Illinois in matters concerning public education. Indeed, the State Board is the only state-level body charged with the supervision of public schools in Illinois. Moreover, the State Board's counterclaim against the Peoria School District was clearly brought for the benefit of the State of Illinois, and is therefore "properly characterized as an action by the [State of Illinois] itself." *Busbee*, 526 F. Supp. at 1245. Given these facts, it was erroneous for the Seventh Circuit to hold that the State Board could not sue as *parens patriae* in this action to enjoin racial discrimination in public education.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2692

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Plaintiff-Appellee,

v.

ILLINOIS STATE BOARD OF EDUCATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 84-C-1103—**Michael M. Mihm**, *Judge.*

ARGUED APRIL 2, 1986—DECIDED JANUARY 27, 1987

Before CUDAHY and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

RIPPLE, *Circuit Judge.* The Illinois State Board of Education (State Board) appeals the district court's dismissal of its counterclaim against the Board of Education of the City of Peoria, School District 150 (Peoria Board) for lack of standing. We affirm.

I

Statement of the Case

On March 26, 1984, the Peoria Board filed suit in district court against the United States Department of Education (USDE) and the State Board. The Peoria Board sought to enjoin the USDE from conducting an administrative hearing pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, on charges that the Peoria Board was intentionally operating a segregated educational program. The Peoria Board named the State Board as an additional defendant because the State Board was a respondent in the administrative proceedings which the Peoria Board sought to enjoin. The State Board filed a counterclaim.[1] It alleged that the Peoria Board was guilty of *de jure* segregation in the operation of its "Gifted Education Program."[2] It sought a declaratory judgment and requested temporary and permanent injunctive relief against the alleged discrimination.

Eventually, the Peoria Board reached a settlement with the USDE. Consequently, the USDE was dismissed as a party. The Peoria Board's complaint against the State Board was also dismissed. Finally, the Peoria Board moved to dismiss the State Board's counterclaim against it. It submitted that the State Board had no standing to assert the matters raised in the counterclaim. In the alternative,

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[1] The State Board invoked both pendent jurisdiction and federal question jurisdiction claiming that its action was authorized under 42 U.S.C. §§ 1981 & 1983. According to the State Board, it had received complaints from parents of black students in the School District 150 in Peoria that the "Gifted Education Program" was operated in a racially discriminatory manner.

[2] According to the State Board's counterclaim, the "Gifted Education Program" is a special program for students attending grades four through eight. The program, available to some 300 students in those grades, is intended to "give special training and enhanced educational opportunity to academically gifted children." R.10 at 6, ¶ 4. The USDE inquiry did not raise the issue of segregation in the gifted program.

the Peoria Board requested that the district court abstain and postpone further proceedings on the counterclaim until state law issues could be resolved in a state court action between the two parties.

On August 30, 1985, the district court granted the Peoria Board's motion to dismiss. It held that the State Board lacked standing to challenge intentional racial segregation by the Peoria School District.

II

The Holding of the District Court

In its memorandum opinion, the district court characterized the "thrust" of Peoria's motion as a contention that the State Board "lacks standing to challenge intentional racial discrimination by a local public school district." R.22 at 2. The court held that, under the law of Illinois, the State Board did not have authority to initiate litigation to eliminate racial segregation. Rather, held the court, the law of Illinois contemplates that, if the State Board determines that segregation exists, it may request that the Illinois Attorney General apply to the appropriate court for relief. In reaching this determination, the district court relied heavily upon *Aurora East Public School District No. 131 v. Cronin*, 92 Ill. 2d 313, 442 N.E.2d 511 (1982).

The district court also held that no federal constitutional or statutory provision imposed an affirmative obligation on the State Board to bring such a suit. "It is neither the letter nor spirit of applicable federal law to create authority on the part of the [State Board] to take any particular type of action. Rather, it is left to the states to determine how to fulfill their responsibilities under the United States Constitution and applicable federal statutes." R.22 at 4.

Finally, the district court held that the State Board did not have standing to assert the constitutional rights of the students.

III

Merits

A. The Issue

We believe that the district court correctly resolved the narrow question before it. While that court, responding to the submission of the parties, addressed the problem in terms of "standing," we believe that the situation is more precisely analyzed as one of capacity to sue.[3] "Capacity has been defined as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest or is the real party in interest." 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1559, at 727 (1971). It concerns "the personal qualifications of a party to litigate. . . ." *Id.*[4] Fed.

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[3] The concepts of standing and capacity to sue are certainly closely related. *See, e.g., Baxley v. Rutland*, 409 F. Supp. 1249, 1256-57 (M.D. Ala. 1976) (discussing the same issue both in terms of standing and capacity to sue). We can hardly fault the district court for choosing the approach it did. At least one other court appears to have followed the same course. *School Dist. of Kansas City, Missouri v. Missouri*, 460 F. Supp. 421, 437-41 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979). One can certainly argue that, since the State Board had no statutory authority to bring suit, it has suffered no "injury in fact" since it has "no personal stake in the outcome of the controversy . . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Such an analytical approach to the problem at hand seems awkward, however, since, as we discuss later in the text, the State Board clearly has a role in the investigation—although not the prosecution—of complaints about the lack of racial equality in the schools. While the result would be the same under either approach, we believe that the issue can be approached more forthrightly in terms of capacity to sue.

[4] We are aware that Fed. R. Civ. P. 9(a) requires that the matter of capacity to sue be raised by "specific negative averment." In its memorandum in support of its motion to dismiss, the Peoria Board raised the issue of the State Board's authority to bring this action in terms of standing rather than as capacity to sue. *See* R.14 at 1 (stating that "the [State Board's] only authority and duty

(Footnote continued on following page)

R. Civ. P. 17(b)[5] basically provides that the matter of capacity be determined under state law. It is well established that the "capacity of an officer of a state, or of a political subdivision of a state, will be determined by the law of the state in which the district court is held." 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 17.19, at 199 (2d ed. 1986); *see Baxley v. Rutland*, 409 F. Supp. 1249 (M.D. Ala. 1976) (capacity of Alabama Attorney General to institute and prosecute action challenging the constitutionality of Alabama statute must be determined by the law of the State of Alabama); *see also National Ass'n of Theatre Owners of Wisconsin, Inc. v. Motion Picture Comm'n*, 328 F. Supp. 6 (E.D. Wis. 1971) (Since commission had capacity to be sued as a matter of state law,

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[4] *continued*
with regard to discrimination in a local district was to hold an administrative hearing pursuant to Section 22-19 of the School Code"). Under the circumstances of this case, we believe that this statement constitutes sufficient compliance with Rule 9(a). As we have already noted, *see supra* note 3, the questions of standing and capacity to sue are, in cases of this sort, interrelated. Moreover, it is clear that both parties and the district court were apprised fully of the Peoria Board's objection to the State Board's counterclaim.

[5] Rule 17(b) provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

Fed. R. Civ. P. 17(b).

it had the capacity to be sued under federal law.). We therefore turn to an examination of Illinois law to determine whether the State Board is a proper party plaintiff.

B. The Role of the State Board

Through its state constitution and various legislative enactments, Illinois has divided responsibility for its school system between state and local authorities. When viewed in its entirety, the constitutional and legislative scheme reflects deliberate—and careful—choices with respect to the distribution of authority. Under Illinois law, the respective roles of the State Board and the local school boards are clearly defined. The Illinois Constitution, art. X, § 2(a) provides that the State Board, "*except as limited by law,* may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. The Board shall have such other duties and powers as provided by law" (emphasis supplied). The Illinois School Code provides that the State Board "shall recommend the passage and the legislation necessary to determine the appropriate relationship between the Board and local boards of education and the various State agencies and shall recommend desirable modifications in the laws which affect schools." Ill. Ann. Stat. ch. 122, ¶ 1A-4(C). This same statutory scheme authorizes the State Board to "supervise all the public schools in the State." Ill. Ann. Stat. ch. 122, ¶ 2-3.3.

The Illinois legislature has vested the local school boards with general authority to ensure that individual school systems are operated in a nondiscriminatory manner. The legislature has charged the local school boards:

> To establish one or more attendance units within the district. As soon as practicable, and from time to time thereafter, the [local] board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality.

Ill. Ann. Stat. ch. 122, ¶ 10-21.3. Still another provision of the School Code reinforces the view that the Illinois legislature intended desegregation to be the primary responsibility of the local boards:

> [Local School Boards have the duty] [t]o assign pupils to the several schools in the district; to admit non-resident pupils when it can be done without prejudice to the rights of resident pupils and provide them with any services of the school including transportation; . . . but no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality. *Nothing herein shall be construed to permit or empower the State Board of Education to order, mandate or require busing or other transportation of pupils for the purpose of achieving racial balance in any school.*

Ill. Ann. Stat. ch. 122, ¶ 10-22.5 (emphasis supplied).

The foregoing constitutional and legislative scheme represents Illinois' decision as to how best to distribute responsibility within state government with respect to the important task of achieving and maintaining racial equality in education. While local boards have the primary duty to take appropriate action, they are subject to the supervision and oversight of the State Board. More precisely, the State Board investigates charges of segregation according to a well-defined statutory procedure. Ill. Ann. Stat. ch. 122, ¶ 22-19 provides that, upon receipt of a complaint endorsed by the lesser of fifty residents or ten percent of the district's residents that a pupil has been impermissibly segregated from any school, the State Board may conduct a hearing to determine the merits of the complaint. If, after a full hearing, the State Board determines that a violation exists, "it shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of." *Id.*

Our interpretation of the division of responsibility contemplated by the Illinois constitutional and statutory

scheme is confirmed by the decision of the Illinois Supreme Court in *Aurora East Public School Dist. No. 131 v. Cronin*, 92 Ill. 2d 313, 442 N.E.2d 511 (1982). In *Aurora East*, two school districts challenged the validity of desegregation rules adopted by the State Board. The circuit court and the intermediate appellate court found the rules to be invalid and enjoined their enforcement. 442 N.E.2d at 512-13. In affirming the judgment of the Illinois Appellate Court, the Supreme Court emphasized that the State Board's authority to act has been "detailed by the legislature."[6] *Id.* at 517. Such a limitation was found in paragraph 22-19 of the School Code, which:

> establishes the procedure by which defendants may combat segregation. In particular, if defendants investigate and determine that discrimination exists, they may request the Attorney General to file suit for appropriate relief. . . . Consequently, the proper course is for defendants to conduct a hearing and refer to the Attorney General any findings of discrimination. This is the extent of the [State] Board's obligation. It is for the Attorney General, as representative of the People, to file suit when a district engages in discriminatory practices.

Id. at 520. More recently, the Appellate Court of Illinois held that the State Board did not have the authority to withhold funds from the Peoria Board's gifted program which was allegedly operated in a discriminatory manner. The Appellate Court reasoned that "the proper course of action for the [State Board] to take if it investigates and determines discrimination exists, is to request the Attor-

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[6] The limited role of the State Board in Illinois' overall fulfillment of its responsibilities with respect to racial equality in education also precludes any possibility of the Board's maintaining a *parens patriae* action. *See United States v. City of Pittsburg, California*, 661 F.2d 783, 787 (9th Cir. 1981); *In re Multi-District Vehicle Air Pollution M.D.L. No. 131 v. Automobile Mfrs. Ass'n, Inc.*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

ney General to file suit for appropriate relief." *Board of Educ. of the City of Peoria, School Dist. No. 150 v. Sanders*, No. 3-86-0158, slip op. at 11 (Ill. App. Ct. 1986).

It is clear that the Attorney General may act to remedy discrimination in Illinois schools.[7] In such cases, the Attorney General acts on behalf of the people of the state, who are the real parties in interest. It is well-settled, under Illinois law, "that the Attorney General is the sole officer authorized to represent the People of [Illinois] in any litigation in which the People of the State are the real party in interest, absent a contrary constitutional directive." *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 500, 359 N.E.2d 149, 156 (1976).

C. The Federal Dimension

The State Board also argues that, since its counterclaim arises under federal as well as state law, it may maintain this counterclaim. More specifically, the State Board submits that its action was required by the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. §§ 1701-1758. The EEOA provides that:

> No *State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take

[7] The Board argues that it has third party standing to vindicate the rights of the children. Because those rights can be vindicated by the children's parents and by the Attorney General, there is no reason to permit the use of this device. *See Singleton v. Wulff*, 428 U.S. 106, 113-15 (1976) (opinion of Blackmun, J.). *See generally Barrows v. Jackson*, 346 U.S. 249 (1953).

> affirmative steps . . . to remove the vestiges of a dual school system. . . .

20 U.S.C. § 1703 (emphasis supplied). The statute does not require that the power to enforce its mandate be vested in any particular state agency; it simply requires that the *state* ensure compliance. Illinois has chosen to vest primary responsibility in its local school boards, supervisory and investigatory responsibility in its State Board and enforcement responsibility in its Attorney General. If the State Board desires a redistribution of those responsibilities, it must address the state legislature, not the federal court.[8]

Finally, the State Board relies upon *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984); *Idaho Migrant Council v. Board of Educ.*, 647 F.2d 69 (9th Cir. 1981); and *United States v. School Dist. of Ferndale*, 577 F.2d 1339 (6th Cir. 1978) as authority for its right to maintain this action. However, none of these cases is helpful to the Board. They merely stand for the proposition that a state board of education is a proper party *defendant* when the plaintiff alleges that its failure to fulfill its responsibilities under state law has produced state non-compliance with the EEOA.

Indeed, these cases help to underline the narrowness of today's holding. We hold only that the State Board does not have the competence to maintain an action to

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[8] The State Board seems to argue that, in *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), the Supreme Court held that the procedures set forth in paragraph 22-19 of the School Code provide an unsatisfactory means for it to satisfy its duties under the EEOA. However, in *McNeese*, the Supreme Court merely held that private litigants need not avail themselves of the state's administrative procedures before bringing suit under 42 U.S.C. § 1983 to protest racial segregation in the Illinois public school system. The Court held that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Id.* at 671.

ensure equality in education because the Illinois legislature has chosen to give the Board a more limited role in fulfilling the State's overall responsibility and has vested the authority to bring such actions in its Attorney General. We do *not* hold that the State Board or any other governmental entity is unaccountable when it contributes to a violation of the constitution or laws of the United States simply because its role in the overall state activity is a limited one.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

CUDAHY, *Circuit Judge,* Dissenting:

The implications of the majority's result are not nearly as "narrow" as the majority suggests. The case before us significantly implicates the Supremacy Clause and furnishes a dangerous precedent for frustrating federal antidiscrimination statutes and the fourteenth amendment through allocations of responsibility for civil rights enforcement among state agencies and local governmental bodies under state law.

The majority opinion essentially makes two points: (1) under Illinois law, the local boards have primary responsibility to see that schools are operated in a nondiscriminatory manner; and (2) insofar as the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 (1982) (the "EEOA"), requires that the *state* ensure compliance with the terms of this act, Illinois has fulfilled its duty by vesting supervisory and investigatory responsibility in the State Board and enforcement responsibility in the State Attorney General. I take issue with both these points.

In concluding that the Illinois legislature intended that local boards have primary responsibility for desegregation, the majority relies heavily on *Aurora East Public School*

District No. 131 v. Cronin, 92 Ill. 2d 313, 442 N.E.2d 511 (1982). *Aurora East*, however, does not bear the weight placed on it by the majority. That case merely held that under Illinois law, the State Board was not authorized to promulgate regulations under the Armstrong Act. Ill. Rev. Stat. ch. 122, para. 10-21.3 (1985). The Armstrong Act was a measure intended to deal only with *de facto* segregation. Neither that act nor *Aurora East* bears on the specific duty of the State Board under the EEOA to combat *intentional* racial segregation, which is the allegation here.

More important, the State of Illinois has a duty under the Constitution and the general federal civil rights statutes to combat intentional racial segregation. State educational officials, who are the members of the state's executive branch charged with the oversight of education in the state, have a duty under federal law to enforce the Constitution and the federal statutes which implement it. The State Board, as the only state-level watchdog for civil rights in education, has an obligation to enforce the Constitution and the general civil rights statutes. *See Bradley v. Milliken*, 484 F.2d 215, 238-44 (6th Cir. 1973) (en banc), *rev'd on other grounds*, 418 U.S. 717 (1974).

The EEOA imposes specific responsibilities on the State Board:

> No *State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an *educational agency* of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an *educational agency* which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system;
>
> . . .

> (d) discrimination by an *educational agency* on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff. . . .

20 U.S.C. § 1703 (1982) (emphasis added). The term "educational agency" is defined in the EEOA to mean a local educational agency or a state educational agency as defined by section 3381(k) of 20 U.S.C. (1982). 20 U.S.C. § 1720(a) (1982). This definition clearly encompasses the State Board. In addition, the State Board is without question a part of the government of the State of Illinois. Ill. Const. art. X, § 2. Hence, the State Board is subject to the duties imposed by the EEOA. *See United States v. School District of Ferndale*, 577 F.2d 1339, 1346-48 (6th Cir. 1978); *Idaho Migrant Council v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981).

It is surely not an adequate answer to say that the state has delegated these duties to its local school districts and therefore that the state as such, through educational officials at the state level, has no further responsibility. To accept this proposition is to suggest that federal civil rights enforcement may be effectively nullified by entrusting it under state law to the very entities against which enforcement might be required.

Nor is reliance on the procedure provided in Ill. Rev. Stat. ch. 122, para. 22-19 any sort of an answer. The gist of that position is that *intentional* (*de jure*) segregation in Peoria may be combatted only if a complaint, joined by the lesser of 50 residents of a school district or 10 percent of the residents, prompts the State Board to initiate hearings on allegations of discrimination. And the holding of such a hearing would in itself provide no remedy. While the State Attorney General may have the power to seek enforcement after the State Board holds a hearing, his office is not the agency to which state resources to underwrite substantive responsibility for education are com-

mitted.[1] This mechanism is also too cumbersome to provide effective oversight of local boards. The United States Supreme Court in *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963), pointed out emphatically the manifest inadequacies of this statutory approach. As the majority points out, *McNeese* did not arise in the precise context of the present case, but that hardly makes its critique of the procedure in question any less telling.

The majority believes "that the Illinois legislature intended desegregation [including presumably the barring of *de jure* segregation] to be the primary responsibility of the local boards." Slip op. at 7. I doubt that the Illinois legislature had any intent going beyond implementation of the Armstrong Act to confront *de facto* segregation. But, even if Illinois wanted to leave all civil rights enforcement to its local school districts, it had no power under federal law to do this when the school districts themselves were the likely civil rights violators. In general, a state may "distribute responsibility" within state government. But it may not do so when, as here, a federal duty has been placed on the state and the result of the state legislature's distribution of responsibility in fulfilling this duty is to leave only foxes at the chicken coop door. The capacity-to-sue doctrine serves a number of useful purposes. But one of these is not to nullify federal law as it imposes duties on state officials. I would therefore reverse the judgment and put the Board to its proof on its counterclaim.

I therefore respectfully dissent.

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[1] It is also no answer to say that while the State Board cannot sue local boards to enforce the EEOA, the State Board can be sued if "it contributes to a violation of the constitution or laws of the United States . . . ." Slip op. at 11. While the State Board's amenability to suit ensures that the *State* Board can be held accountable if it violates the EEOA, the problem addressed by this dissent is the lack of an effective mechanism to enforce the EEOA as against the *local* boards.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 18, 1987.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

No. 85-2692

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Plaintiff,

v.

ILLINOIS STATE BOARD OF EDUCATION,

Defendant,

and

ILLINOIS STATE BOARD OF EDUCATION,

Counter-Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Counter-Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 84 C 1103—**Michael M. Mihm**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellant on February 10, 1987, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX C

[Entered August 30, 1985]
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 84-1103

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Plaintiff,

v.

ILLINOIS STATE BOARD OF EDUCATION,

Defendant,

and

ILLINOIS STATE BOARD OF EDUCATION,

Counter-Plaintiff,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Counter-Defendant.

MEMORANDUM AND ORDER

Plaintiff/Counter-Defendant, Board of Education of the City of Peoria, School District 150 ("District 150"), moves to dismiss the counterclaim of the Illinois State Board of

Education ("ISBE") contending that the Court lacks jurisdiction over the subject matter. In the alternative, District 150 moves that the Court abstain from exercising jurisdiction and stay any action on the counterclaim pending determination of certain issues in a related action, Case No. 85-1235.

District 150 filed suit against the United States Department of Education ("USDE") and the ISBE seeking to enjoin the USDE from conducting an administrative hearing on charges that the Peoria School District had engaged in intentional race discrimination against black citizens in assigning students to various programs in its public schools, and further, that District 150 had engaged in intentional race discrimination in the assignment of educational personnel to various buildings and programs.[1] Subsequently, the ISBE filed a counterclaim. The counterclaim alleges that District 150 is guilty of de jure segregation in the institution and operation of its "gifted education program."

The thrust of District 150's motion to dismiss the counterclaim is that the ISBE lacks standing to challenge intentional racial discrimination by a local public school district. District 150 relies heavily on *Aurora East Public School District No. 131 v. Cronin*, 92 Ill.2d 313, 442 N.E.2d 511, 66 Ill.Dec. 85 (1982). In *Aurora East*, two school districts challenged the validity of desegregation rules promulgated by the ISBE for the purpose of enforcing the Armstrong Act, Ill.Rev.Stat., ch. 122, §10-21.3. The court held that the state board lacked the authority to adopt such rules. It refused to construe relevant provisions of the Illinois State Constitution or of the Illinois School Code as granting to the ISBE the authority it sought. The court stated that §22-19 of the School Code, Ill.Rev.Stat., ch. 122, §22-19, "establishes the procedure by which the state board

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[1] District 150 subsequently moved for voluntary dismissal of the USDE. That motion was granted.

may combat segregation." 66 Ill.Dec. at 94. That section provides that when the board receives a complaint charging racial discrimination, it is authorized to hold an administrative hearing and, if it determines that a violation exists, it may request the Illinois Attorney General to apply to an appropriate court for relief. The court stated that:

> "This is the extent of the Board's obligation. It is for the Attorney General, as representative of the People, to file suit when a district engages in discriminatory practices." 66 Ill.Dec. at 94.

The ISBE responds by citing numerous cases in which it has been held that state level education officials have the responsibility to combat de jure segregation when it is discovered. These holdings are factually inapposite to the present case, however, since they deal with a state board's liability where applicable state law has granted authority to the state board to eliminate segregation. In Illinois, the ISBE has not been granted such authority.

The ISBE, however, also contends that it has the responsibility pursuant to federal law to combat de jure segregation. It claims to have a duty under the Fourteenth Amendment, general federal civil rights statutes, and the Equal Education Opportunities Act of 1974 ("EEOA"), 20 U.S.C. §1701-1758. Two courts of appeals have construed the EEOA as requiring state educational agencies to take affirmative action to combat and correct de jure segregation by local school officials once the state agency has knowledge of those illegal activities. *United States v. School District of Ferndale*, 577 F.2d 1339, 1346-49 (6th Cir. 1978), *Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981), *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983).

The cases cited by the ISBE are inapposite to the case at bar since in each of these cases, the court found an affirmative duty on the part of the state educational board

to remedy discrimination.[2] The Illinois Supreme Court in *Aurora East* specifically defined and limited the ability of the ISBE to combat segregation. It is neither the letter nor spirit of applicable federal law to create authority on the part of the ISBE to take any particular type of action. Rather, it is left to the states to determine how to fulfill their responsibilities under the United States Constitution and applicable federal statutes. *Aurora East* defines the procedures to be followed by the ISBE and any obligation under federal law flows to the Illinois state government as it is structured by the state.

In filing its counterclaim, the ISBE failed to follow the procedures set forth in §22-19. The Court finds no merit in the ISBE's contention that the procedures established in §22-19 of the School Code provide a remedy only for de facto, not de jure, segregation. The Court holds that the ISBE lacks standing to assert the matters raised in its counterclaim. In view of this holding, it is unnecessary to address the other issues raised by the parties.

In accordance with the foregoing, District 150's Motion to Dismiss the ISBE's Counterclaim is GRANTED. Further, District 150's Motion for Voluntary Dismissal is GRANTED. District 150's Complaint as to the ISBE is DISMISSED without prejudice. Case closed. Each party is to bear its own costs.

ORDER ENTERED: August 30, 1985.

/s/ MICHAEL M. MIHM
United States District Judge

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[2] In addition, none of the cases cited by the ISBE hold that a state board of education has standing to assert the constitutional rights of students. They merely hold that a state board is a proper party defendant in a desegregation action where the board has been guilty of discriminatory practices or has failed to take steps to combat segregation within local districts.

(2)

No. 86-2028

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ILLINOIS STATE BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Illinois State Board of Education has standing and capacity to file suit on behalf of school children alleging violation of the Equal Educational Opportunities Act of 1974.

II. Whether the ISBE has parens patriae standing to assert the rights of school children in a suit that charges a local school district with discrimination.

TABLE OF CONTENTS

II.

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

The Petitioner quotes the Supremacy Clause as a "Constitutional Provision Involved". The Supremacy Clause is not pertinent to this appeal as no conflict exists between federal and state law.

United States Statute

This case involves section 1706 of the Equal Educational Opportunities Act, 20 U.S.C. §1706, which provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

ADDITIONAL STATEMENT

Respondent disputes the Illinois State Board of Education's ("ISBE") contention that the counterclaim seeks to enjoin the Board of Education of the City of Peoria ("the Peoria District") from violating the EEOA. The counterclaim contains no reference to the EEOA.

In the district court, the ISBE's theory of standing was based upon the assertion that the ISBE was exposed to potential liability as a result of the Peoria District's actions. Paragraph 3 of the counterclaim provides:

> "Under §2-3.3 of The School Code (Ill.Rev.Stat. 1983, ch. 122, par. 2-3.3.), the Defendant, ISBE, has the power and duty to supervise all public schools in the State of Illinois. Due to this power and duty, liability can be asserted against Defendant ISBE in federal court if: 1) Defendant ISBE discovers that a school district under its supervision is intentionally violating the civil rights of students secured by the United

> States Constitution and by federal law and 2) should Defendant ISBE then fail to take reasonable steps to attempt to correct such violations of student's civil rights by a school district under its supervision".

The court of appeals held that the ISBE had no standing to sue as it "had no statutory authority to bring suit." 810 F.2d at 709 n.3. The court of appeals denied the ISBE's petition for rehearing and suggestion for rehearing en banc, as no judge in active service requested a vote on the petition and a majority of the judges on the panel voted to deny a rehearing.

SUMMARY OF ARGUMENT

The ISBE has neither standing nor capacity to sue to enforce the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701 et. seq. ("EEOA" or the "Act"). Section 1706 of the EEOA provides that only individuals denied an equal

educational opportunity and the United States Attorney General may bring an action to enforce its terms. Congress expressly limited the parties who may file suit to enforce the EEOA. State level educational agencies have no authority to do so.

Assuming Congress had attempted to grant standing to the ISBE to enforce the EEOA by civil suit, such attempt would have been ineffective. The ISBE cannot allege the necessary constitutional injury to satisfy the standing requirement of Article III of the federal Constitution.

The ISBE does not have parens patriae standing as it is a state agency with only limited authority granted by the Illinois constitution and the Illinois legislature. The ISBE does not have the sovereign powers of the State of Illinois. Furthermore, the ISBE's counterclaim seeks

to correct an alleged problem arising within the control of the State of Illinois and its legislature.

ARGUMENT

I. THE STATE BOARD OF EDUCATION HAS NO STANDING OR CAPACITY TO SUE TO ENFORCE THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974.

Petitioner's main argument is that it was authorized, if not mandated, by the EEOA to sue the Peoria District to enforce the Act. The ISBE's argument is unsound in two respects. First, the ISBE's counterclaim does not refer to the EEOA. Second, the EEOA delimits the parties who may bring suit to enforce its terms. None of those parties are state level educational agencies.

A. The ISBE Did Not Plead A Violation Of The EEOA By The Peoria District.

The ISBE's Petition for a Writ of Certiorari ("Petition") states that its

counterclaim seeks to enjoin the Peoria District from operating a segregated program in violation of the EEOA. The ISBE further argues that it has standing to enforce the EEOA. The ISBE counterclaim, however, makes no reference to the EEOA. The EEOA is not alleged as a basis for jurisdiction, nor is it alleged that the Peoria District violated the EEOA. Pleadings must contain allegations showing that the complainant is the proper party to file suit. Warth v. Seldin, 422 U.S. 490, 498-99 (1975). Petitioner's counterclaim does not allege a breach of the EEOA and the Act therefore cannot form the basis of a standing claim.

B. The EEOA Permits Suit Only By Individuals Denied An Equal Educational Opportunity And The Attorney General Of The United States.

Assuming the ISBE's right to bring suit under the EEOA is considered, despite the fact that an EEOA violation was not pleaded, the ISBE is not a proper party to file suit to enforce the Act. The ISBE's argument is based upon the erroneous assumption that it has standing and capacity to bring suit to enforce the Act. Standing to enforce the EEOA is granted by section 1706 of the Act, reference to which is noticeably absent in the ISBE's Petition. Section 1706 provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

Congress specifically limited standing to individuals denied an equal educational opportunity and the Attorney General of the United States. Nowhere are state level agencies authorized to file a civil action to enforce the statute.

It is well established that Congress may place limitations upon parties authorized to file suit to enforce federal statutes. In Sierra Club v. Morton, 405 U.S. 727, 732 (1972), this Court stated:

> "Where, however, Congress has authorized public officials to perform certain functions according to the law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

In Sierra Club the Court further stated:

> ["w]here a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular

> issue,' [citation], is one within the power of Congress to determine." 405 U.S. at 732 (1972)

In Bread Political Action Committee v. Federal Election Committee, 455 U.S. 577 (1982), this Court held that the expedited review procedures of section 310(a) of the Federal Election Campaign Act of 1971, 2 U.S.C. §437h(a), could be invoked only by the three parties specifically named in the statute. 455 U.S. at 583-84. The Bread Court refused to "read an implicit grant of standing into Congressional silence." 455 U.S. at 584.

Where a party bases a claim of standing or capacity to sue on a federal statute, that party must be one authorized by Congress to maintain the action. See Warth v. Seldin, 422 U.S. 490, 501, (1975); Locals 666 & 780 v. United States Department of Labor, 760 F.2d 141, 143-144 (7th Cir. 1985). Section 1706 of the EEOA

specifically delimits the parties who may bring a civil action to enforce the EEOA. Those parties are the United States Attorney General and individuals denied an equal educational opportunity.[1] The individuals denied an equal educational opportunity are the students. No other parties have authority to bring suit, nor to have a suit brought on their behalf. See Castaneda v. Pickard, 648 F.2d 989, 999 (5th Cir. 1981); Kiper v. La. State Board of Elementary & Secondary Education, 592 F.Supp. 1343, 1348 (N.D. La. 1984), aff'd, 778 F.2d 789 (1985); United States v. School District of Ferndale, Michigan,

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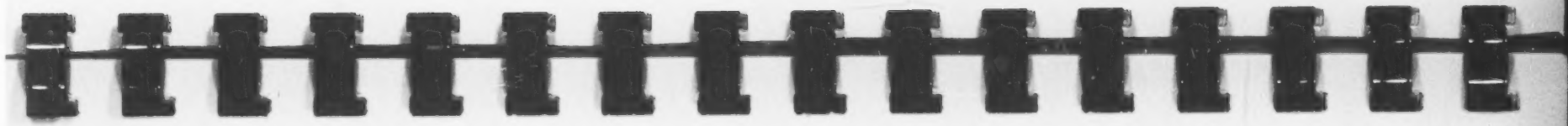
[1]This grant of standing is more limited than that granted by federal statutes which authorize suit by "any person aggrieved". See 20 U.S.C. 1415(e)(2) (suits to protect rights of handicapped children); 42 U.S.C. §2000(d)(2) (suits to enforce the right to be free from discrimination under federal financial assistance program).



400 F.Supp. 1122, 1128-29 (E.D. Mich. 1975), aff'd in part, see 577 F.2d 1339, 1344, n. 6 (1978).

That the ISBE has no authority to institute suit to enforce the EEOA is further shown by sections 1709 and 1710 of the Act, 20 U.S.C. §§ 1709, 1710. Section 1709 permits the Attorney General to intervene in a suit begun by an individual. Section 1710 requires the Attorney General, prior to instituting suit, to give notice to the appropriate educational agency of the conditions which, in his judgment, constitute a violation of the Act. The Attorney General must also certify to the appropriate district court that he is satisfied the educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action. These limitations

confirm that the Attorney General is the only party, other than an individual denied an equal educational opportunity, who may bring an action.

Nothing in the EEOA authorizes a state level educational agency to file suit to enforce its terms. The EEOA merely provides that an educational agency, in exercising the authority granted it, must not exercise that authority in such a manner as to deny an individual an equal educational opportunity. The Act does not expand the authority of a state educational agency over what it perceives to be discrimination within a local district.[2] As the court of appeals

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[2]The ISBE's argument that its authority is derived from federal law is contradicted by the ISBE's pleading. Paragraph 2 of the ISBE counterclaim provides in pertinent part:

"The Defendant ISBE is a division within

(Footnote Continued)

in this case aptly noted, all of the cases cited by the State Board:

> "[m]erely stand for the proposition that a state board of education is a proper party defendant when the plaintiff alleges that its failure to fulfill its responsibilities under state law has produced state non-compliance with the EEOA." 810 F.2d at 713.

The court of appeals correctly held that the ISBE was not a proper plaintiff to bring an action under the EEOA.

Assuming, arguendo, that Congress attempted to grant standing to the ISBE to file suit to enforce the EEOA, such attempt would have been invalid. Congress may grant standing to the full extent

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(Footnote Continued)

> the executive branch of the government of the State of Illinois created by Article X, Section 2 of the 1970 Constitution of the State of Illinois. The Defendant ISBE's powers and duties are established by the Constitution of the State of Illinois and by state law".

permitted by Article III of the United States Constitution, but Congress may not grant standing to a party who has not suffered a distinct injury so as to meet the constitutional requirements of Article III. In Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), the Court stated:

> "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' (citation) In no event, however, may Congress abrogate the Art. III minima: A. Plaintiff must always have suffered "a distinct and palpable injury to himself," ibid., that is likely to be redressed if the requested relief is granted." (citation)

See also Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). Even if Congress attempted to grant standing to the ISBE, the ISBE would not be a proper party to file suit, as ISBE has not suffered "a

distinct and palpable injury."[3] There is no suggestion or argument in the ISBE's Petition that it has suffered, or that it was threatened with, a distinct and palpable injury as a result of the alleged discrimination by the Peoria District. The ISBE is precluded from raising this issue, as issues not raised in the petition are not before the Court. Namet v. United States, 373 U.S. 179, 190 (1963).

Furthermore, assuming the ISBE could argue that it had suffered an injury, the argument is meritless. Plaintiff's theory of standing has changed from that advanced in the district court. As noted above, the ISBE's counterclaim contains no

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[3] In Fisher v. Tucson School Dist. No. 1 625 F.2d 834, 838 (9th Cir. 1980), the court held that the EEOA did not grant plaintiff standing where the plaintiff could show no "personal impact" of "constitutional dimension."

reference to the EEOA. The only attempt to allege a constitutional injury to the ISBE is contained in paragraph 3 of the counterclaim which provides:

> "Under §2-3.3 of The School Code (Ill.Rev.Stat. 1983, ch. 122, par. 2-3.3.), the Defendant, ISBE, has the power and duty to supervise all public schools in the State of Illinois. Due to this power and duty, liability can be asserted against Defendant ISBE in federal court if: 1) Defendant ISBE discovers that a school district under its supervision is intentionally violating the civil rights of students secured by the United States Constitution and by federal law and 2) should Defendant ISBE then fail to take reasonable steps to attempt to correct such violations of student's civil rights by a school district under its supervision".

A plaintiff must allege facts showing that he has sustained, or is immediately in danger of sustaining a direct injury as a result of defendant's conduct. The injury or its threat must be "real and immed-

iate," not "conjectural" or "hypothetical". City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). The ISBE's counterclaim assumes that the ISBE can be vicariously liable for the Peoria District's conduct. The court of appeals correctly noted that the authority of the ISBE with regard to claimed discrimination within a local district is limited. The ISBE can be liable when, exercising the authority granted it, it has engaged in discriminatory conduct. The ISBE is not, however, vicariously liable for a local district's conduct.

Assuming the ISBE might be a defendant in a suit challenging the local district's gifted program, the ISBE has not alleged that any suit exists or is threatened. Alleged exposure to a civil liability is "wholly speculative" and insufficient to constitute the required

constitutional injury. See City of Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231, 238 (9th Cir. 1980), cert. denied, 449 U.S. 1039 (1980).

The ISBE would be disqualified as a plaintiff even if a sufficient injury were alleged. In order to assert the rights of third parties (the students), the ISBE would have to show that:

1) the ISBE is as effective a proponent of the students' rights as are the students; and

2) the students have a genuine obstacle to the assertion of the right. Singleton v. Wulff, 428 U.S. 106, 114-116 (1976).

Neither requirement is met here. If the ISBE is a potential defendant in a suit brought by the students, the ISBE would have a substantial conflict of interest in representing the interests of the students It is questionable whether the ISBE would fully and adequately prosecute a discrim-

ination claim when that same claim could be asserted against it. See Jenkins by Agyei v. Missouri, 807 F.2d 657, 682 (8th Cir. 1986); School District of Kansas City v. Missouri, 460 F.Supp. 421, 441 (W.D. Mo. 1978), appeal dismissed, 592 F.2d 493 (8th Cir. 1979). Where the relationship between the plaintiff and the third party is adverse, the plaintiff will not be permitted to assert the third party's rights. Gold Cross Ambulance & Transfer, Inc., v. City of Kansas City, 705 F.2d 1005, 1016 (8th Cir. 1983), cert. denied, 469 U.S. 538 (1985).

There is also no genuine obstacle to the students' assertion of their own rights. The students and their parents have standing to sue to protect the students' rights. Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391, 1398 (10th Cir. 1985). The

students have express standing to sue to enforce the EEOA. 20 U.S.C. §1706. The court of appeals below correctly observed that third parties are not entitled to bring suit on behalf of students when there is no obstacle to a suit by the students and their parents. 810 F.2d at 712 n.7 (7th Cir. 1987); Mercer v. Michigan State Board of Education, 379 F.Supp. 580, 584 (E.D. Mich. 1974), aff'd, 419 U.S. 1081 (1974).

Contrary to Petitioner's assertions, the Seventh Circuit's opinion in this case is in no way inconsistent with McNeese v. Board of Education, 373 U.S. 668 (1963). McNeese merely held that students need not resort to the administrative procedure of section 22-19 of the Illinois School Code, Ill. Rev. Stat. ch. 122, ¶22-19, before filing suit in federal court. McNeese did not concern the ISBE's standing or

capacity to bring a direct action to enforce the students' civil rights. Rather, McNeese supports the Peoria District's position that the ISBE's authority is governed by state, not federal law.

Under Illinois law, a local district is required to file with the state superintendent, as a prerequisite for obtaining state aid, an affidavit that the district does not discriminate on the basis of race. Ill. Rev. Stat. ch. 122, ¶18-12. In McNeese, the Court questioned whether the state superintendent would certify a district for state aid if he determined that the affidavit was false. The McNeese Court stated:

> "Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false." 373 U.S. at 676 (1963).

McNeese explicitly recognized that the authority of the superintendent to withhold state funding was governed by Illinois, not federal law.[4]

There is no conflict between the EEOA and Illinois law. Section 22-19 of the Illinois School Code delimits the authority of the ISBE to initiate action to question alleged discrimination within a local district. Aurora East Public School District No. 131 v. Cronin, 92 Ill.2d 313, 442 N.E.2d 511 (1981). A conflict between federal and state law would arise only if

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[4]In a related case involving the Peoria School District and the ISBE, Board of Education of the City of Peoria, School Dist. No. 150 v. Sanders, 150 Ill.App.3d 755, 502 N.E. 2d 730 (3rd Dist. 1986), leave to appeal denied, 116 Ill.2d 321 (1987), the Illinois court answered the question posed by this Court in McNeese. The court held that the ISBE did not have authority to withhold state funds after the ISBE made a unilateral determination that discrimination existed.

the EEOA authorized suit by the ISBE. Had Congress wished to expand the class of plaintiffs to include state boards of education, it could have easily done so. Petitioner asks this Court to "read an implicit grant of standing into Congressional silence," an action this Court refused to take in Bread Political Action Committee v. Federal Election Committee, 455 U.S. 577, 584 (1982). As noted above, however, Congress could not expand the jurisdiction of the Article III courts to include as party plaintiffs those, such as the ISBE, who have not suffered a distinct and palpable injury.

II. THE COURT OF APPEALS PROPERLY DENIED PARENS PATRIAE STANDING TO THE ISBE.

Entities whose power is derivative, and not sovereign, cannot sue as parens patriae. In re Multi-District Vehicle Air Pollution M.D.L. No. 131 v. Automobile Manufacturers Association, Inc., 481 F.2d

122, 131 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1974). That the ISBE is a state agency with only those powers granted by state law was made clear by the Illinois Supreme Court in Aurora East Public School District No. 131. v. Cronin, 92 Ill.2d 313, 326, 442 N.E.2d 511 (1982). See also Board of Education of the City of Peoria, School District v. Sanders, 150 Ill.App.3d 755, 502 N.E.2d 730, 736 (3d Dist. 1986), leave to appeal denied, 116 Ill.2d 21 (1987). The Aurora court held the ISBE had no authority to promulgate regulations with regard to segregation. The limitations placed upon the ISBE in Aurora clearly show the ISBE is merely an agent of the State and cannot exercise the powers of a sovereign.

Parens patriae standing also requires a finding that individuals could not obtain complete relief through a private

suit. People by Abrams v. 11 Cornwell Co., 695 F.2d 34, 40 (2d Cir. 1982), vacated in part on other grounds, 718 F.2d 22 (1983). This requirement is similar to the requirement that there be a genuine obstacle to suit by a third party. Singleton v. Wulff, 428 U.S. 106, 114-16 (1976). The students and their parents could obtain complete relief in a private suit. Therefore, there is no justification for granting parens patriae standing.

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez, 458 U.S. 592 (1982), does not support the ISBE's claim of standing. Snapp was a suit by the Commonwealth of Puerto Rico, not one of its agencies. Puerto Rico sought in Snapp to correct a problem arising outside its borders and beyond the control of its legislature. 458 U.S. at 594-600. The Commonwealth wished to protect not only

the well-being of its residents, but also its sovereign interest in "the benefits that are to flow from participation in the federal system". 458 U.S. at 607-08. Under the circumstances, this Court found the case proper for an exercise of parens patriae jurisdiction. Id. at 609-10.

In the case at bar, the ISBE, a state agency, seeks to resolve a problem within the State Legislature's authority. Thus, Snapp is easily distinguishable from this case, and it provides no authority whatsoever for the ISBE's attempt to exercise standing. The Illinois Legislature has addressed the problem of racial discrimination in public schools and delegated authority for its elimination. That the ISBE is dissatisfied with its statutory role does not confer it with parens patriae standing. On the contrary, the State of Illinois' limited delegation of

authority to the ISBE confirms that it does not have the authority of a sovereign to claim parens patriae standing.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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